

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

PAUL R. SCHMERSEY,

Debtor.

Case No. **02-51838-7**

RICHARD J. SAMSON,

Plaintiff.

-VS-

**PAUL R. SCHMERSEY, ARTHUR G
SCHMERSEY REVOCABLE TRUST,
LESLIE R MONROE, and JOHN
SCHMERSEY,**

Defendants.

Adv No. **05-00038**

MEMORANDUM OF DECISION

At Butte in said District this 15th day of August, 2005.

In this adversary proceeding filed by the Plaintiff/Chapter 7 Trustee Richard J. Samson for turnover and determination of estate's interest in property, after due notice, a hearing was held at Missoula on July 7, 2005, on the Motion, filed April 15, 2005, by Defendants Arthur G. Schmersey Revocable Trust (hereinafter the "Trust"), Leslie R. Monroe, and John S. Schmersey

to compel proper service by the Trustee/Plaintiff Richard J. Samson (“Samson”) on the Defendant/Debtor Paul R. Schmersey, and to stay these proceedings until service is effected. The Plaintiff Samson filed an objection on the grounds that service was made upon the Debtor at the address shown on Debtor’s petition and statement of affairs, and that the Debtor has not filed a statement of change of his address as required by F.R.B.P. Rule 4002(5). Attorney Harold V. Dye (“Dye”) appeared at the hearing in support of Defendants’ Motion. The Plaintiff’s attorney James H. Cossitt appeared. The Defendant/Debtor Paul R. Schmersey did not appear. No testimony or exhibits were admitted. The Court heard argument from counsel, after which the Court took the Defendants’ Motion to compel service and stay proceeding under advisement. After review of the record and applicable law, Defendants’ Motion will be denied.

This Court has jurisdiction of this adversary proceeding under 28 U.S.C. § 1334(b). This adversary proceeding to determine the estate’s interest in and for turnover of nonexempt property is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (E).

Defendants move to stay this adversary proceeding and compel the Plaintiff to serve the Debtor with the summons and complaint in accordance with Fed. R. Civ. P. 4(f) (applicable in adversary proceedings under F.R.B.P. 7004(a)) because the Debtor resides in a foreign country, i.e., New Zealand, and Plaintiff’s service on the Debtor by first class mail pursuant to F.R.B.P. 7004(b)(9) is not appropriate for an individual in a foreign country. Defendants argue that the first clause of Rule 7004(b) limits service by first class mail to within the United States. Movants seek to compel service on the Debtor pursuant to Rule 4(f) because they may be subject to conflicting claims by the Debtor in the future if he is not properly served and thereby bound by any judgment issued herein.

The Plaintiff objects to Defendants' Motion on the grounds that the Debtor was served with the summons and complaint pursuant to Rule 7004(b)(9) at the Debtor's address shown on his bankruptcy petition, and Debtor has not filed a statement of change of address as required by F.R.B.P. 4002(5). Plaintiff's objection is well taken.

FACTS

The Debtor filed a Chapter 7 petition on June 19, 2002, listing his address as 86 Golf Terrace, Bigfork, Montana 59911. Debtor has not filed a statement of change of Debtor's address, as is listed among the "Duties of Debtor" listed at F.R.B.P. 4002(5). Debtor's attorney of record is Gregory E. Paskell ("Paskell").

The Debtor listed no interest in his Schedules as beneficiary of the above-named Defendant Trust. A discharge of the Debtor was entered on March 28, 2003. Samson filed the complaint commencing this adversary proceeding on April 1, 2005, alleging the estate's interest in and seeking turnover of Trust assets. A summons was issued on April 4, 2005. Samson filed a "First Amended & Substituted Complaint" on April 6, 2005, and filed on April 13, 2005, a certificate of service of the "First Amended & Substituted Complaint" and the summons on the Movants and their attorney Dye, on the Debtor Paul Schmersey at 86 Golf Terrace, Bigfork, MT 59911, and on Paskell. Movants filed their motion to compel and to stay this adversary proceeding on April 15, 2005. No answer has been filed.

No evidence has been admitted in this adversary proceeding¹ of the Debtor's presence or address in New Zealand.

¹In Adversary Proceeding No. 03/00253, evidence was admitted at trial of the Debtor's New Zealand address at Docket No. 46, page 14.

DISCUSSION

Where service is made by mail, service upon a debtor is governed by Rule 7004(b)(9) which states that “in addition to the methods of service authorized by Rule 4(e)–(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

* * * *

(9) Upon the debtor, after a petition has been filed by or service upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.”

See, In re Croston, 313 B.R. 447, 455 n.10 (9th Cir. BAP 2004).

Samson served the summons and First Amended & Substituted Complaint upon the Debtor at the address shown on his bankruptcy petition, and on his attorney Paskell.

Defendants contend that the first clause of Rule 7004(b) “made within the United States” limits service by first class mail under Rule 7004(b)(9), and because the Debtor resides in New Zealand service must be made upon him pursuant to Rule 4(f) “Service Upon Individuals in a Foreign Country”. However, the Debtor has a duty imposed by F.R.B.P. Rule 4002(5) to file a statement of any change of the Debtor's address. *Croston*, 313 B.R. at 455. The last known address of the Debtor for the purpose of mailing a summons and complaint was the address designated by the Debtor on his petition: 86 Golf Terrace, Bigfork, MT 59911, which is within the United States and was not changed by the Debtor as he has the duty to do under Rule 4002(5). Therefore, the Plaintiff served the summons and complaint on the Debtor in accordance with Rule 7004(b)(9) at his address of record as he was required to do.

A leading commentator explains regarding a debtor's duty to report change of address:

[T]he rules provide that process must be served on the debtor as well as the debtor's counsel in bankruptcy cases. Such service must be at the address designated on the petition or statement of affairs unless the debtor designates a different address with the court. Thus, *even if a party knew of a debtor's new address, it would be required to serve the debtor at an incorrect prior address absent the filing of a statement of new address.* (Emphasis added).

9 COLLIER ON BANKRUPTCY, ¶ 4002.06 (15th Ed. 2004).

Samson served the Debtor with the summons and complaint at the address listed by the Debtor on the petition. "Where notices are sent to the address last listed by the debtor, in documents filed with the court, as his mailing address, due process is satisfied." *In re Davis*, 275 B.R. 864, 866-67 (8th Cir. BAP 2002); *DeVore v. Marshack (In re DeVore)*, 223 B.R. 193, 197-97 (9th Cir. BAP 1998) (other citations omitted). Thus, Movants' concern that they may be subject to claims by the Debtor in the future if he is not properly served and bound by any judgment issued herein is not warranted on due process grounds. Any error in service of the summons and complaint as required pursuant to applicable rules was caused by the Debtor's own failure to notify the Court of any change in his address pursuant to Bankruptcy Rule 4002(5), and such failure to perform his delegated duties will not be rewarded. *See, In re Shapiro*, 265 B.R. 373, 379 (Bankr. E.D. N.Y. 2001).

In conclusion, the Court finds that the Movants have failed to show that the Plaintiff's service of process on the Debtor in compliance with Rule 7004(b)(9) was insufficient or improper, when the Debtor has not fulfilled his duty under Rule 4002(5) to file a statement of any change in the Debtor's address.

IT IS ORDERED a separate Order shall be entered in conformity with the above,

sustaining the Plaintiff's objection, and denying the Defendants' Motion, filed April 15, 2005, to compel proper service on the Defendant/Debtor Paul R. Schmersey and to stay these proceedings.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", written over a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana